No. 09-440

In The Supreme Court of the United States

WILLIAM H. SCHRAMM,

Petitioner,

v.

RAY LAHOOD,
Secretary, Department of Transportation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Argument 1

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).....3, 4, 9

Becker v. Montgomery, 532 U.S. 757 (2001) 4

Benn v. First Judicial Dist. of Pa., 426 F.3d 233 (3d Cir. 2005).....2

Bogart v. Chapell, 396 F.3d 548 (4th Cir. 2005) 2

Chambers v. City of Fordyce, Arkansas, 508 F.3d 878 (8th Cir. 2007) 2

City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425 (2d Cir. 2008).....2

Constructa Andrade-Gutierrez, S.A. v. American Intern. Ins. Co. of Puerto Rico, 467 F.3d 38 (1st Cir. 2008).....2

Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158 (11th Cir. 1988).....2

Dawson v. City of Seattle, 435 F.3d 1054 (9th Cir. 2006).....2

Eberhart v. United States, 546 U.S. 12 (2005).....3, 11

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004).....2

Hudson v. District of Columbia, 588 F.3d 526 (D.C. Cir. 2009).....2

Hudson v. Parker, 156 U.S. 277 (1895).....8

In re Turner, 574 F.3d 349 (7th Cir. 2009).....2

Kontrick v. Ryan, 540 U.S. 443 (2004).....3, 4, 8, 11

TABLE OF AUTHORITIES – Continued

Page

McBride v. CITGO Petroleum Corp., 281 F.3d 1099 (10th Cir. 2002) 2

Pearson v. Callahan, 128 S.Ct. 1702 (2008) 11

Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989) 10

Scarborough v. Principi, 541 U.S. 401 (2004) 3

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 7

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) ..... *passim*

U.S. v. Alisal Water Corp., 431 F.3d 643 (9th Cir. 2005) 2

U.S. v. Dando, 287 F.3d 1007 (10th Cir. 2002) 2

U.S. v. Paul, 551 F.3d 516 (6th Cir. 2009) 2

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers, 130 S.Ct. 584 (2009) ..... *passim*

United States ex rel. Eisentein v. City of New York, 129 S.Ct. 2230 (June 8, 2009) 4

Venner v. Great Northern Ry. Co., 209 U.S. 24 (1908) 8

STATUTES

28 U.S.C. § 2072(a) 10

45 U.S.C. § 153 First (v) 5, 7, 10

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Federal Rules of Appellate Procedure

Rule 3 ..... 1, 2, 6, 11

Rule 3(c)(1)(A) 2

Rule 3(c)(1)(B) 2, 3

Rule 4 1

OTHER AUTHORITIES

Brief of the United States as Amicus Curiae Supporting Respondent, *Kontrick v. Ryan* 8

ARGUMENT

Petitioner submits this supplemental brief regarding the Court's decision of December 8, 2009 in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 130 S.Ct. 584 (2009). In light of that decision, we urge that the time has come to overrule the holding of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that the requirements of Rule 3 of the Federal Rules of Appellate Procedure are jurisdictional.

(1) Twenty-one years ago this Court held that Rule 3(c) of the Federal Rules of Appellate Procedure is a "jurisdictional prerequisite." *Torres v. Oakland Scavenger Co.*, 487 U.S. at 318; see *id.* at 314 ("Rule ... 3(c) presents a jurisdictional bar"), 317 ("the jurisdictional requirements of Rules 3 and 4."). That holding rested in particular on the interpretation of the Advisory Committee that originally drafted Rules 3 and 4.

> The [Note of] the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a single jurisdictional threshold.... Our conclusion that the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature, although not determinative, is "of weight" in our construction of the rules.

Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444 (1946).

487 U.S. at 315-16.[1]

In the wake of the controlling decision in *Torres*, all twelve geographic courts of appeals have held that Rule 3 is jurisdictional.[2] In the instant case the court below, citing the decision in *Torres* and relying on well established Sixth Circuit precedent,[3] treated Rule 3(c)(1)(B) as jurisdictional. (App. 11a).[4] The Sixth Circuit's view that Rule 3(c)(1)(B) is jurisdictional

---

[1] *Torres* concerned the application of Rule 3(c)(1)(A), governing the designation of the party taking an appeal. The interpretation of Rule 3(c)(1)(A) in *Torres* was superseded by the 1993 amendment to Rule 3(c)(1)(A).

[2] *Constructa Andrade-Gutierrez, S.A. v. American Intern. Ins. Co. of Puerto Rico*, 467 F.3d 38, 44 (1st Cir. 2008); *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 452 (2d Cir. 2008); *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 236 (3d Cir. 2005); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 806 n.8 (5th Cir. 2004); *U.S. v. Paul*, 551 F.3d 516, 531 (6th Cir. 2009); *In re Turner*, 574 F.3d 349, 352 (7th Cir. 2009); *Chambers v. City of Fordyce, Arkansas*, 508 F.3d 878, 880 (8th Cir. 2007); *Dawson v. City of Seattle*, 435 F.3d 1054, 1070 (9th Cir. 2006); *U.S. v. Alisal Water Corp.*, 431 F.3d 643, 660 (9th Cir. 2005); *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002); *U.S. v. Dando*, 287 F.3d 1007, 1010 (10th Cir. 2002); *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158, 161 (11th Cir. 1988); *Hudson v. District of Columbia*, 588 F.3d 526, 529 (D.C. Cir. 2009).

[3] Prior to the decision in the instant case there were more than two dozen Sixth Circuit decisions holding Rule 3 jurisdictional.

[4] "Rule 3 imposes jurisdictional requirements that may not be waived, even for good cause shown."

was critical to its disposition of the medical disqualification claim in this case. Whether the notice of appeal in this case complied with Rule 3(c)(1)(B) was first raised by the court itself, as it was required to do regarding any jurisdictional requirement, even though the appellee had not objected to the sufficiency of the notice of appeal. (App. 9a).[5] If the requirements of Rule 3(c)(1)(B) are not jurisdictional, the appellee clearly had waived any such objection. The Sixth Circuit held it "lack[ed] jurisdiction over the district court's order." (App. 16a).[6]

Since *Torres* was decided, however, this Court has repeatedly cautioned that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term [jurisdictional]." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); see *Eberhart v. United States*, 546 U.S. 12, 18 (2005) (per curiam); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004). In *Kontrick* this Court emphasized that the term "jurisdictional" should be used

---

[5] "Although the Secretary did not bring Schramm's omission to our attention, we have a duty to consider sua sponte whether appellate jurisdiction is properly invoked.... Accordingly, at oral argument we raised the issue whether there is a jurisdictional defect in the notice of appeal."

[6] See App. 23a ("the appeal filed in the medical disqualification case ... is dismissed for lack of jurisdiction") (capitalization omitted).

> not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

540 U.S. at 455. *Arbaugh* held that a statutory requirement should be deemed only a claim-processing rule or an element of a claim unless "the Legislature clearly states that a ... limitation ... shall count as jurisdictional." 546 U.S. at 515.

Despite this recent insistence on a more limited use of the term "jurisdictional," this Court has not revisited the original holding in *Torres* that Rule 3 is jurisdictional. Only seven months ago the Court reiterated, albeit in a footnote, the holding in *Torres*.

> We recognize that construing Rule 3(c) [of the Federal Rules of Appellate Procedure] as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not the judicial process."

United States ex rel. Eisentein v. City of New York, 129 S.Ct. 2230, 2236 n.4 (June 8, 2009) (quoting *Torres*, 487 U.S. at 318 (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986))).[7]

---

[7] In *Becker v. Montgomery*, 532 U.S. 757, 765 (2001), this Court reiterated that "[a]ppellate Rules 3 and 4 ... are indeed linked jurisdictional provisions."

Since the filing of the petition in the instant case, however, this Court's decision in *Union Pacific* has seriously undermined the specific reasoning which led the Court in *Torres* to conclude that Rule 3 is jurisdictional. *Union Pacific* concerned a rule of the National Railroad Adjustment Board which precluded consideration of a case absent proof that conferencing had occurred. 130 S.Ct. at 597-98. The Carrier in *Union Pacific* contended that the Board which had adopted the rule in question itself regarded that requirement as jurisdictional, an argument similar to the reasoning in *Torres*, which had relied on the views of the Advisory Committee in holding that Rule 3 is jurisdictional.

Union Pacific, however, held that the views of those who framed a rule as to whether it is jurisdictional are irrelevant unless Congress has by statute authorized those officials to create a jurisdictional requirement.

> The Carrier cites NRAB decisions that allegedly support characterization of conferencing as jurisdictional. If the NRAB lacks authority to define the jurisdiction of its panels, however, surely the panels themselves lack that authority.

130 S.Ct. at 598. The statute authorizing the NRAB to issue rules stated only, in general terms, that the Board could "adopt such rules as it deems necessary to control proceedings." 45 U.S.C. § 153 First (v); see *Union Pacific*, 130 S.Ct. at 597-98. The Court concluded that this language did not empower the Board

to issue a jurisdiction-restricting rule. 130 S. Ct. at 590 ("Congress authorized the Board to prescribe rules for the presentation and processing of claims, ... but Congress alone controls the Board's jurisdiction"), 597 ("Congress gave the Board no authority to adopt rules of jurisdictional dimension."). Because the statutory authority of the NRAB to adopt rules did not include the power to issue rules limiting the jurisdiction of the Board or its panels, *Union Pacific* concluded that the rule in that case was not jurisdictional. 130 S.Ct. at 597-98.

(2) *Union Pacific* held that the Railway Labor Act's generally phrased statutory authorization for the adoption of rules did not permit the issuance of a rule that limits the jurisdiction of the National Railroad Adjustment Board. *Union Pacific* is apparently the first decision of this Court determining whether a particular statute authorizing the adoption of a procedural rule empowered the court or agency to promulgate a jurisdiction-limiting provision. The holding of *Union Pacific* rests on principles equally applicable to the Rules Enabling Act under which Rule 3 was adopted.

Under the terms of the Railway Labor Act, the jurisdiction of National Railroad Adjustment Board

> extends to "all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application or agreements concerning rates of pay, rules, or working conditions....'" *Slocum v. Delaware,*

L. & W.R. Co., 339 U.S. 239, 240 (1950) (quoting § 153 First (i)).

130 S.Ct. at 597. Although the Railway Labor Act requires conferencing, the statutory conferencing requirement is set out in a provision separate from the grant of jurisdiction, and the conferencing requirement does not "'speak[] in jurisdictional terms or refer[] in any way to the jurisdiction of the' NRAB." 130 S.Ct. at 597 n.8 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Thus under the Railway Labor Act itself, the Board would have jurisdiction over a grievance even where that grievance had not first gone through conferencing. 130 S.Ct. at 394.

A rule adopted by the Board could not modify or override any portion of the Railway Labor Act – including the Act's grant of jurisdiction to the Board – unless the provision authorizing adoption of rules expressly stated that such a rule could supersede the terms of the Act itself. Section 153 First (v), which authorizes the Board to adopt rules, contains no such express power to modify the terms of the jurisdictional grant in the Railway Labor Act. Section 153 First (v) thus did not empower the Board "by rule, to extend or restrict the jurisdiction conferred by ... statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).

When the Railway Labor Act was adopted, several decisions of this Court had indicated that a court-adopted rule could not restrict the jurisdiction

of that or any other court.[8] "[T]his Court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States ... under the constitution and laws of the United States." *Hudson v. Parker*, 156 U.S. 277, 284 (1895); see *Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 35 (1908) ("The jurisdiction of the circuit court is prescribed by laws enacted by Congress in pursuance of the Constitution, and this court by its rules has no power to increase or diminish the jurisdiction thus created"). In the absence of any express statutory indication to the contrary, it is reasonable to assume that in adopting the Railway Labor Act (or any other statute) Congress did not intend to

---

[8] In *Kontrick* the government took the position that *only* a statute, and not a rule, could limit (or extend) the jurisdiction of a court.

> The jurisdiction of the lower federal courts is created by statute, not by rules of practice. As this Court has emphasized, "[i]t is axiomatic" that the rules of practice and procedure established by this Court for the lower federal courts can neither create nor destroy the jurisdiction that Congress has created. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978).... In order for a time limit for filing a claim to constitute a true "jurisdictional prerequisite to suit in federal court" (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. [385,] 393 [(1982)]), it would need to be established by Congress, not in a rule of practice or procedure adopted by this Court.

Brief of the United States as Amicus Curiae Supporting Respondent, at 10-11 (footnote omitted), available at 2003 WL 21688237.

authorize the promulgation of the type of jurisdiction-restricting rule which this Court had repeatedly indicated would be impermissible.

Arbaugh v. Y & H Corp. held that a statute establishing a procedural or substantive requirement should not be construed as jurisdictional in nature unless the text of the law "clearly states" that a jurisdictional restriction was being created. 546 U.S. at 516. A similar rule of construction is appropriate for determining whether a statute authorizes the adoption of rules that restrict or expand jurisdiction. A jurisdiction-limiting rule, like a statute construed to impose a jurisdictional requirement, is disfavored because it would pose a significant risk of "unfair[ness]" and "waste of judicial resources." *Arbaugh*, 546 U.S. at 515. If (as under *Arbaugh*) statutes authorizing the adoption of rules are presumed not to authorize jurisdiction-limiting rules unless such authority is "clearly state[d]," "courts and litigants will ... not be left to wrestle with the issue." 546 U.S. at 515-16. The provision of the Railway Labor Act that authorizes the Board to adopt rules, like the statute at issue in *Arbaugh*, "does not speak in jurisdictional terms." 546 U.S. at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

(3) The original decision in *Torres* never considered the threshold issue now deemed critical under *Union Pacific*, whether the Rules Enabling Act authorized the Advisory Committee to frame, and this Court to adopt, a rule which limits the subject matter jurisdiction of the lower courts. In light of the standard

established by *Union Pacific*, it is clear that the Rules Enabling Act does not empower this Court to promulgate such a rule.

The Rules Enabling Act provides that this Court "shall have the power to prescribe general rules of practice and procedure ... for cases in the United States ... courts of appeals." 28 U.S.C. § 2072(a). That general language is similar to the wording of the rule-authorizing provision of the Railway Labor Act which *Union Pacific* held did not empower the NRAB to issue a jurisdiction-restricting rule. The Rules Enabling Act, like section 153 First (v) of the Railway Labor Act, does not "speak in jurisdictional terms," and thus is insufficient to authorize this Court to adopt rules which limit the jurisdiction of the courts of appeals or district courts. Section 2072(a) authorizes only the adoption of non-jurisdictional claim-processing rules.

Although *Union Pacific* has largely eviscerated the rationale of *Torres*, the conflict between those decisions of this Court is not one which the lower courts have the power to resolve. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S.

477, 484 (1989).[9] Because *Torres* squarely holds that Rule 3 is jurisdictional, the lower courts could not revisit the correctness of *Torres* even if this Court were to vacate and remand the instant case for reconsideration in light of *Union Pacific*. On such a remand the courts below would still be obligated to continue to apply *Torres*. Similarly, because all lower courts remain bound by *Torres*, it is unlikely that a conflict will arise among the courts of appeals as to whether Rule 3 is jurisdictional.[10]

In light of the decision in *Union Pacific*, the time has come to reconsider the holding in *Torres* that Rule 3 is jurisdictional. In granting certiorari, the Court should direct the parties to brief and argue the following question: "Whether the Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that Rule 3 of the Federal Rules of Appellate Procedure is jurisdictional, should be overruled?" See *Pearson v. Callahan*, 128 S.Ct. 1702 (2008).

---

[9] This is a situation like *Eberhart v. United States*, in which the lower courts will likely and correctly conclude that they remain bound by *Torres*. In *Eberhart* the court of appeals regarded itself as bound by this Court's earlier decisions, "even though it expressed grave doubts in light of *Kontrick*." 546 U.S. at 18. This Court held that the court of appeals in *Eberhart* had taken the "prudent course" by not undertaking on its own to "upset[ ] what the Court of Appeals took to be our settled precedents." *Id.*

[10] Since this Court's 2004 decision in *Kontrick*, almost every circuit has reiterated its adherence to the holding of *Torres* that Rule 3 is jurisdictional. See n.2, *supra*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner